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No. _____

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1997

STATE OF NORTH CAROLINA,
Petitioner,

v.

RICHARD ALLEN JACKSON,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE NORTH CAROLINA SUPREME COURT

PETITION FOR WRIT OF CERTIORARI

MICHAEL F. EASLEY
NORTH CAROLINA ATTORNEY GENERAL

William P. Hart*
Special Deputy Attorney General

North Carolina Department of Justice
Post Office Box 629
Raleigh, North Carolina 27602
Telephone: (919) 716-6500

***Counsel of Record**

53 pp

CAPITAL CASE

QUESTION PRESENTED

1. **Whether the "Free to Leave" Test Established by this Court to Determine Whether a Person Has Been "Seized" for Fourth Amendment Purposes May Be Applied by a State Instead of this Court's Fifth Amendment "Indicia of Arrest" Test in an Inquiry of Whether a Person Is "In Custody" for Miranda Purposes?**

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PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF NORTH CAROLINA

OPINION BELOW

The opinion of the Supreme Court of North Carolina, *State v. Jackson*, 497 S.E.2d 409 (N.C. 1998), is included at 1a - 9a.

JURISDICTION

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1257 and Rule 10 (b) and (c) of the Rules of the Supreme Court of the United States.

CONSTITUTIONAL PROVISIONS INVOLVED

Amendment V of the United States Constitution provides in pertinent part: "No person ... shall be compelled, in any criminal case, to be a witness against himself...."

Amendment XIV, § 1 of the United States Constitution provides, in pertinent part: "Nor shall any state deprive any person of life, liberty, or property, without due process of law...."

STATEMENT OF THE CASE

I. Facts of the Case

Sometime after 8:30 a.m. on October 31, 1994, Karen Styles, 22, left her parents' home to go running at the Bent Creek Recreational Area in Buncombe County, North Carolina. She did not appear for work at her place of employment at 2:00 p.m. on that date, and she did not return home that evening. On November 25, 1994, Karen's badly-decomposed body was discovered, nude from the waist down, taped to a tree with duct tape. Although her shirt and shoes were still on her body, her bra and panties had been ripped off and her shorts had been completely ripped up both sides. A pornographic magazine and a wrapper for a K-Mart brand of duct tape were found near the body. On her body were several pairings of marks which were characteristic of a stun gun assault. The cause of her death was a .22 caliber contact gunshot wound to her head.

At about 11:00 a.m. on December 20, 1994, two plainclothes detectives from the Buncombe County Sheriff's Department arrived at the restaurant where Richard Jackson (Jackson) worked. (MT pp 265-66) They had obtained his name as being a person who had bought a .22 caliber rifle and duct tape at a local K-Mart three days before Karen Styles disappeared. (MT pp 300, 347-50) They identified themselves to Jackson and asked him if he would accompany them to the sheriff's department to talk with them. The detectives told Jackson that he was not under arrest, that they were investigating the death of Karen Styles, and that they wanted to ask him some questions. Jackson said that he would go with them, and he told another employee at the restaurant that he would be back shortly. (MT pp 267-68) Jackson led the officers out the front door of the restaurant. As they approached the unmarked police car, Jackson asked where he should sit. The detectives told him that he could sit in front or back, whichever he wanted. He chose to sit up front. The detectives did not pat him down, search him, or handcuff him, before getting into the car or at the sheriff's department. They did not display any weapons. Jackson put on his own seat belt. (MT pp 268-70) During the ten to twelve minute drive to the sheriff's department, Jackson asked what this was all about. The detectives told him that his name had come up as a suspect in the death of Karen Styles, and that they needed to do some things to eliminate him as a suspect. Jackson said that he did not have anything to do with the death of Karen Styles, that he did not know where the Bent Creek area was, and that he had not owned a gun for the last two years. (MT pp 270-74)

Jackson and the detectives arrived at the sheriff's department at about 11:17 a.m. The detectives took Jackson to a ten-by-twelve foot interview room with a conference table, seven or eight chairs, a one-way window, and a window with blinds. (MT pp 274-75) The detectives again told Jackson that he was not under arrest. (MT p 282) They advised him of his Miranda rights. Jackson said he understood his rights and signed a waiver of those rights. (MT pp 276-79) The detectives asked Jackson if he would consent to a search of his person and to the taking of fingerprints and blood and hair samples. Jackson consented and signed a permission form. (MT pp 279-81) Jackson stated that he wanted to cooperate, get it over with, and get back to work. (MT p 282) From then until 2:00 p.m., the detectives interviewed Jackson, and different people came in to take fingerprints, blood samples, and hair samples. (MT pp 282-88) At some point during that time Jackson needed to use the bathroom. A detective showed him where the bathroom was. (MT pp 283-84) At about 2:00 p.m., the sheriff told one of the detectives that he wanted to talk with Jackson. One of the detectives told Jackson of the sheriff's request and reminded him that he was not under arrest. Jackson said, "Sure. Fine." (MT pp 288-89) The sheriff asked Jackson, "What did you do with the rifle that Karen Styles was shot with?" Jackson stated, "I think I need a lawyer present." The sheriff told Jackson that he did not want him to answer any more questions, but that he wanted to tell him something. The sheriff stated, "Son, I know you bought the rifle and the duct tape at K-Mart on the 28th of October. I know you were in Bent Creek on the day she was killed, and that's fine, but you

need help." (MT pp 289-90) Jackson broke down crying and said, "But I didn't mean to kill nobody. I didn't." Still crying, Jackson continued, "I'm sorry; I didn't mean to kill her." A detective tried to calm him down. When Jackson finally became calm, the detective and the sheriff walked out of the room. (MT p 290) After conferring with an assistant district attorney, they went back into the interview room at about 2:10 p.m. and again advised Jackson of his Miranda rights. Jackson signed another waiver of rights form and gave an oral statement admitting responsibility for the kidnapping, rape, and death of Karen Styles. (MT pp 291-94) A warrant for arrest was issued for Jackson at 4:19 p.m. (R p 2)

On January 9, 1995, the grand jury of Buncombe County indicted Jackson for first degree murder first degree kidnapping, and first degree rape.

II. Trial Court Proceedings

Prior to trial, Jackson filed a written motion to suppress his statements to law enforcement officers, alleging a violation of his Constitutional rights. At the conclusion of a hearing, the trial court denied the motion and made findings of fact and conclusions of law in support of its decision, finding that none of Jackson's state or federal constitutional rights were violated. The trial court concluded that there were no threats or inducements to make the statements; that the statements were made voluntarily and understandingly; and that Jackson knowingly, intelligently, and voluntarily waived his

constitutional rights before making the statements to the officers. (Transcript of oral order included at 13a - 18a)

Jackson was tried at the November 6, 1995 Criminal Session of Buncombe County Superior Court. On November 20, 1995, the jury found Jackson guilty of first degree murder, kidnapping, and rape. On November 22, 1995, the same jury recommended that Jackson be sentenced to death and Judge Downs sentenced him accordingly. Jackson appealed to the Supreme Court of North Carolina, alleging *inter alia* violations of his Federal Constitutional rights under the Fifth and Fourteenth Amendments in the obtaining of his statements by law enforcement.

III. The Decision of the Supreme Court of North Carolina

On April 3, 1998, the Supreme Court of North Carolina issued its opinion in this case. Addressing the issue of whether Jackson was in custody for *Miranda* purposes, the court referred to the rulings of this Court in *Edwards v. Arizona*, 451 U.S. 477 (1981) and *Miranda v. Arizona*, 384 U.S. 436 (1966) and stated, "A suspect is in custody when, considering the totality of circumstances, a reasonable person in the suspect's position would not feel free to leave." *Jackson*, 497 S.E.2d at 411. (5a) Noting that the trial court had made no specific finding of whether Jackson was in custody, the court stated that the lack of such a finding did not prevent it from evaluating the evidence and deciding whether Jackson was in custody. The court then concluded that "a reasonable person in the

defendant's position when he was confronted by the sheriff would have felt he was in custody and would not have felt free to leave." *Id.* at 411. (6a) Discussing its reasoning, the court stated, "The defendant had told the officers he was anxious to return to work, and despite answering all questions from them and telling them he had no knowledge of the crime, he was never told that he was free to leave or that he would be given a ride to his home or place of work if he decided to leave." *Id.* at 411. (6a) The court went on to say as follows:

> After being in the interrogation room for a period of approximately three hours, during which time he was questioned by the officers in regard to the murder, had hair and blood samples taken, and was fingerprinted, a reasonable man at the least would have wondered whether he was free to leave. When the sheriff asked him what he had done with the rifle he had used to kill the victim, this informed the defendant that the sheriff thought he had committed murder. A reasonable man in the defendant's position who had been interrogated for approximately three hours and thought the sheriff believed he had committed murder would not have thought he was free to leave. He would have thought the sheriff intended to hold him for prosecution for murder. Thus, we hold that the defendant was in custody when he inquired about an attorney.

Id. at 411. (7a)

The court went on to address the question of whether Jackson had unequivocally invoked his right to counsel when he stated, "I think I need a lawyer present." The court found that Jackson's statement was not ambiguous, that he had invoked his right to counsel, and that the interrogation should have stopped at that point. The court further found that Jackson did not initiate the communication that led to his statements and that no attorney was present when they were made. *Id.* at 412. (8a-9a) The court stated that it could not conclude beyond a reasonable doubt that the admission of Jackson's post-invocation statements was harmless error. *Id.* at 412. (9a) Based upon its determination that Jackson was in custody and had invoked his right to counsel, the court reversed the order of the trial court denying Jackson's motion to suppress and granted Jackson a new trial. *Id.* at 412. (9a)

On April 23, 1998, the Supreme Court issued its mandate and final judgment. (Attached at 11a) The Supreme Court of North Carolina will not entertain petitions for rehearing in criminal actions. Rule 31 (g) of the North Carolina Rules of Appellate Procedure.

REASONS WHY THE WRIT SHOULD BE GRANTED

The prophylactic protections of Miranda apply only when a person is "in custody." The decision below applied an unduly broad standard for determining when a person is "in custody"

which is in conflict with decisions of this Court and other courts. The standard applied by the Supreme Court of North Carolina is one applied by this Court in Fourth Amendment "seizure" situations, thus confusing "custody" with "seizure." Several other State Supreme Courts and federal Courts of Appeal have applied that same standard. This issue warrants prompt review by this Court so that police officers are provided adequate guidance and confessions are not improperly and inconsistently suppressed through the application of confused and inconsistent standards.

The purpose of the Miranda warnings "is to dissipate the compulsion inherent in custodial interrogation and, in so doing, guard against abridgment of the suspect's Fifth Amendment rights." *Moran v. Burbine*, 475 U.S. 412, 425 (1986). They were not designed to prevent the confession of a suspect with a conscience who voluntarily participates in an interview at a police station. An officer's obligation to administer Miranda warnings attaches "only where there has been such a restriction on a person's freedom as to render him 'in custody.'" *Oregon v. Mathiason*, 429 U.S. 492, 495 (1977). "In determining whether an individual was in custody, a court must examine all of the circumstances surrounding the interrogation, but 'the ultimate inquiry is simply whether there [was] a "formal arrest or restraint on freedom of movement" of the degree associated with a formal arrest.'" *Stansbury v. California*, 511 U.S. 318, 322 (1994) (quoting *California v. Beheler*, 463 U.S. 1121, 1125 (1983) (*per curiam*), quoting in turn *Oregon v. Mathiason*, 429 U.S. 492, 495 (1977) (*per curiam*)).

Jackson had not been formally arrested in this case. Nor had there been any restraint on Jackson's freedom of movement of the degree associated with a formal arrest. The Supreme Court of North Carolina never analyzed the facts of this case in the context of indicia of formal arrest. Erroneously applying a "free to leave" test, the court ignored the absence of indicia of arrest and held that an interrogation became custodial when a law enforcement officer made a statement from which a reasonable person could infer that the officer thought he committed the crime under investigation. By so doing, the Supreme Court of North Carolina has confused "seizure" and "custody" and has impermissibly and erroneously expanded the meaning of "in custody."

The Supreme Court of North Carolina is not the only court which has departed from this Court's definition of "custody." Although many courts have correctly understood and applied the test developed by this Court, several state and federal courts have been applying a "free to leave" test similar to that applied in *Jackson*. Some other courts are applying other tests which are not consistent with this Court's test or the "free to leave" test. Such inconsistency is especially unfortunate in this area of application of prophylactic measures which this Court imposed in order to make it easier to protect Constitutional rights. Expansion of this Court's definition of "custody" by lower state and federal courts means that confessions obtained without violation of federal Constitutional rights are being improperly and inconsistently suppressed under the auspices of this Court's prophylactic rules. This issue warrants prompt

review by this Court.

ARGUMENT

I. The Decision of The Court Below Applied a Fourth Amendment "Free to Leave" Test Which Conflicts With The Standard Developed by This Court For Determining Whether a Person Is "In Custody" For Fifth Amendment Miranda Purposes.

A. This Court Has Held That "Custody" Requires Formal Arrest or Restraint of Movement of the Degree Associated with a Formal Arrest.

This Court originally defined "custodial interrogation" to mean questioning "after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way." *Miranda*, 384 U.S. at 444. As lower courts struggled to interpret this Court's definition of "custody," this Court has taken several additional opportunities to guide the various courts by clarifying its meaning of "custody" and how it is determined. The current test, as developed by this Court, is whether there was a formal arrest or restraint on freedom of movement of the degree associated with a formal arrest. *Stansbury*, 511 U.S. at 322.

In *Mathiason*, this Court reviewed a decision of the Oregon Supreme Court in which that court concluded that, although Mathiason had gone to the police station at the request of the police and had been told that he was not under arrest, he

was "in custody" because he was told he was a suspect, he was falsely told that the officers had evidence incriminating him in the crime, and the questioning took place in a "coercive environment." This Court stated that "[a]ny interview of one suspected of a crime by a police officer will have coercive aspects to it, simply by virtue of the fact that the police officer is part of a law enforcement system which may ultimately cause the suspect to be charged with a crime"; that "police officers are not required to administer Miranda warnings to everyone whom they question"; and that the requirement of warnings is not to be "imposed simply because the questioning takes place in the station house, or because the questioned person is one whom the police suspect." *Mathiason*, 429 U.S. at 495. This Court found no indication that the questioning had taken place in a context where Mathiason's freedom to depart was restricted in any way and summarily reversed the Oregon court because its focus was incorrect. *Id.* at 495-96.

Six years later, this Court refined the "custody" standard. In *Beheler*, this Court reviewed a decision of the California Court of Appeals in which that court, in the absence of any indicia of formal arrest, found "custody" where the interview took place in the station house, the police had already identified Beheler as a suspect, and the design of the interview was to produce incriminating responses. This Court held that the circumstances which determine whether a person is "in custody" for Miranda purposes must be analyzed in terms of the ultimate inquiry, which is simply "whether there is a 'formal arrest or restraint on freedom of movement' of the

degree associated with a formal arrest." *Beheler*, 463 U.S. at 1125. This Court summarily reversed the California court because that court improperly focused on the facts that Beheler was a suspect and that he was questioned at the station house, rather than focusing on indicia of formal arrest.

One year after *Beheler*, this Court addressed a situation which would explain to the lower courts why a determination of "whether a reasonable person would feel free to leave" was an insufficient inquiry in "custody" issues. In *Berkemer v. McCarty*, 468 U.S. 420 (1984), this Court reviewed a decision of the Court of Appeals for the Sixth Circuit to resolve confusion in the courts on the issue of the applicability of its ruling in *Miranda* to the questioning of motorists detained pursuant to traffic stops. Although this Court acknowledged that a traffic stop significantly curtails the "freedom of action" of a driver or a passenger of a vehicle, it accorded no "talismanic power" to that phrase. Although it found that such a stop and detention constitutes a "seizure" within the meaning of the Fourth Amendment, this Court compared such detentions to Terry stops, which are not subject to the dictates of *Miranda*. *Id.* at 436-40. This Court held that the safeguards prescribed by *Miranda* become applicable in a traffic stop and detention only when a suspect's "freedom of action is curtailed to a 'degree associated with formal arrest.'" *Id.* at 440. This Court went on to find that there was no "custody" until McCarty was formally arrested because prior to formal arrest there had been no "functional equivalent of formal arrest." *Id.* at 442.

Ten years later, this Court found it necessary to correct another lower court's misunderstanding of the standard for determining whether someone was "in custody" for Miranda purposes. In *Stansbury*, this Court reviewed a decision of the California Supreme Court in which that court based its "custody" decision mainly on the fact that the investigation had focused on Stansbury even though the officer's suspicions were not conveyed to him. This Court found that the analysis of the California court on the "custody" issue was not consistent in all respects with this Court's principles of determination of "custody" and reversed the decision of that court. In so doing, this Court discussed the "custody" assessment in terms of "how a reasonable person in that position would perceive his or her freedom to leave," but did so in the context of "the ultimate inquiry" which "is simply whether there [was] a 'formal arrest or restraint on freedom of movement' of the degree associated with a formal arrest." *Stansbury*, 511 U.S. at 322, 325.

B. The Decision of the Court Below Confused the Tests for "Seizure" and "Custody" and Applied a "Free to Leave" Test Which Does Not Look to the Presence of Any Indicia of a Formal Arrest.

Initially addressing the issue of "custody," the Supreme Court of North Carolina referred to the rulings of this Court in *Edwards v. Arizona*, 451 U.S. 477 (1981) and *Miranda v.*

Arizona, 384 U.S. 436 (1966) and stated, "A suspect is in custody when, considering the totality of circumstances, a reasonable person in the suspect's position would not feel free to leave." *Jackson*, 497 S.E.2d at 411. (5a) The Court then concluded that "a reasonable person in the defendant's position when he was confronted by the sheriff would have felt he was in custody and would not have felt free to leave." *Id.* at 411. (6a) As authority for the "free to leave" test the court cited its opinion in *State v. Medlin*, 426 S.E.2d 402, 407 (N.C. 1993), which cited three prior opinions of that court, all of which cited prior opinions of this Court, including *Mathiason*, *McCarty*, and *United States v. Mendenhall*, 446 U.S. 544 (1980), as authority for the test to determine custody.[1] Under the *Mendenhall* "free to leave" test, "a person is 'seized' for Fourth Amendment purposes only when, by means of physical force or a show of authority, his freedom of movement is restrained." *Id.* at 553. That "seizure" test was not the appropriate standard to determine whether Jackson was "in custody."

Neither the *Mendenhall* test nor any other "free to leave" test has ever been this Court's test for determining custody for Miranda purposes. This Court has expressed that the perception of a reasonable man of his freedom to leave is part of the inquiry, but *only* in the context of the objective circumstances of formal arrest or restraint on freedom of movement of the degree associated with a formal arrest.

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[1] *State v. Torres*, 412 S.E.2d 20, 24-25 (N.C. 1992); *State v. Smith*, 343 S.E.2d 518, 520 (N.C. 1986); *State v. Davis*, 290 S.E.2d 574, 580-81 (N.C. 1982).

Stansbury, 511 U.S. at 322, 325, relying on *Beheler* and *Mathiason*.

The Supreme Court of North Carolina never analyzed whether Jackson was under formal arrest or whether restraints had been placed on his freedom of movement of the degree associated with a formal arrest. Its analysis focused on the "free to leave" test without the formal arrest context required by this Court in *Mathiason*, *Beheler* and *Stansbury*. That analysis was similar to the analysis of the Oregon Supreme Court which this Court found to be erroneous in *Mathiason*. Had the court used the proper test for "custody," it would have found no indicia of formal arrest and would have found that Jackson was not "in custody." Instead, the court, using an improper test, expanded the meaning of "custodial interrogation" and found that Jackson was "in custody."

In its analysis of the circumstances, the Supreme Court of North Carolina completely ignored the lack of objective indicia of formal arrest and focused on the fact that Jackson "was never told that he was free to leave or that he would be given a ride to his home or place of work if he decided to leave." *Jackson*, 497 S.E.2d at 411. (6a)

It is true that the detectives never told Jackson that he was free to leave or that they would give him a ride home if he wanted them to do so. They also never told him that he was not free to leave or that they would not give him a ride home if he wanted them to do so. Jackson never said he wanted to leave,

never asked to leave, never asked if he was free to leave, and never asked for a ride home. The detectives told Jackson three different times that he was not under arrest, once at the restaurant, again when he first arrived at the sheriff's department, and again before the sheriff talked to him. The plainclothes detectives did not handcuff him, pat him down, or search him prior to Jackson getting into the front seat of the unmarked car or at the sheriff's department. They did not display any weapons. Jackson told his co-worker that he would be back shortly. He told the detectives that he was willing to cooperate with the requested procedures and that he just wanted to get them over with and get back to work. He also said, "Sure. Fine." when told that the sheriff would like to talk with him. There was no evidence of display of weapons, physical touching, or physical force used, and there was no show of authority by the detectives. From the circumstances, it is clear that Jackson had not been formally arrested and that there had not been such restrictions on his freedom of movement of the degree associated with a formal arrest. The Court below acknowledged as much by its statement that, before the sheriff made his statement, "a reasonable man at the least would have *wondered* whether he was free to leave." *Id.* at 411 (7a) (emphasis added).

The Supreme Court of North Carolina departed from this Court's principles of determining "custody" when it held that the statement of the sheriff, which informed Jackson that the sheriff thought that he had committed the murder, transformed the noncustodial situation into a custodial one. An officer's

belief that a person has committed a crime, when conveyed to that person even in a coercive environment, is not sufficient to convert a noncustodial situation into a custodial one absent formal arrest or restraint on freedom of movement. This is true even when the officer confronts the person with false statements of evidence of his guilt. *Mathiason*, at 495-96. (An officer's false statement to a suspect at a police station interrogation that the suspect's fingerprints had been found at the crime scene "ha[d] nothing to do with whether [that suspect] was in custody for purposes of the Miranda rule." There was "no indication that [the suspect's] freedom to depart was restricted in any way.")

In its *Jackson* decision, the Supreme Court of North Carolina did not focus on the presence of any indicia of formal arrest. It did not even engage in such an analysis. The court did not find that Jackson had been formally arrested or that there had been any restraint on his freedom of movement of the degree associated with a formal arrest. Indeed, it could not have so found. There was no evidence of any circumstances which would justify such a finding. Instead, the Court confused the tests for "seizure" and "custody" and impermissibly and erroneously expanded the meaning of "custodial interrogation." It found, in the absence of formal arrest or any restraint on freedom of movement of the degree associated with a formal arrest, that a noncustodial interview became a custodial interrogation when a law enforcement officer made a statement from which a reasonable person could infer that the officer thought that he had committed the crime

under investigation.

II. The Supreme Court of North Carolina Is Part of a Minority of Lower Courts Which Has Departed From This Court's "Custody" Test.

There is a serious division of authority in the state and federal courts on the meaning of custody for Miranda purposes. Although most courts[2] have correctly understood and applied

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[2] *United States v. Ventura*, 85 F.3d 708, 710 (1st Cir. 1996) (since Miranda, [the Supreme Court] has enunciated several general definitions of custody, but the ultimate inquiry is whether there was a formal arrest or restraint on freedom of movement of the degree associated with a formal arrest), *on further review*, 132 F.3d 844, 846 (1998) (ultimate question is whether there was a formal arrest or restraint on freedom of movement of the degree associated with a formal arrest); *United States v. Ali*, 68 F.3d 1468, 1472 (2d Cir. 1995) (whether a reasonable person in situation would have understood himself to be subjected to restraints comparable to those associated with formal arrest), *as amended on denial of rehearing, on rehearing* 86 F.3d 275 (1996); *United States v. Howard*, 115 F.3d 1151, 1154 (4th Cir. 1997) (whether freedom of action is curtailed to a degree associated with formal arrest); *United States v. Gonzalez*, 121 F.3d 928, 939-40 (5th Cir. 1997) (whether reasonable person would understand situation to constitute restraint on freedom of movement to degree associated with formal arrest), *cert. denied*, ___ U.S. ___, 118 S.Ct. 726 (1998); *United States v. Phillip*, 948 F.2d 241, 247 (6th Cir. 1991) (coercive environments not rising to level of formal arrest or restraint on freedom of movement do not constitute custody within meaning of *Miranda*), *cert. denied*, 504 U.S. 930 (1992); *United States v. Usuff*, 96 F.3d 982, 987 (7th Cir. 1996) (whether movement restrained to degree comparable to formal arrest), *cert. denied*, ___ U.S. ___, 117 S.Ct. 999 (1997); *Jenner v. Smith*, 982 F.2d 329, 334-35 (8th Cir. 1993) (whether there was a formal arrest or restraint on freedom of movement of the degree associated with a formal arrest), *cert. denied*, 510 U.S. 822 (1993); *United States v. Glover*, 104 F.3d 1570, 1578 (10th Cir. 1997) (whether there was a restraint on freedom of movement to a degree associated with formal arrest); *United States v. Moya*,

74 F.3d 1117, 1119 (11th Cir. 1996) (whether restrictions on freedom of movement are of the degree associated with formal arrest); *Smolder v. State*, 671 So.2d 757, 759-60 (Ala. Crim. App. 1995) (whether there was a formal arrest or restraint on freedom of movement of the degree associated with a formal arrest); *State v. Spreitz*, 945 P.2d 1260, 1274 (Ariz. 1997) (whether a person's freedom of movement is restricted to the extent it would be tantamount to formal arrest), *cert. denied*, ___ U.S. ___, 118 S.Ct. 1315 (1998); *Johnson v. State*, 926 S.W.2d 837, 840 (Ark. 1996) (whether a person's freedom of action was curtailed to a degree associated with formal arrest); *People v. Stansbury*, 889 P.2d 588, 591 (Cal. 1995) (on remand from this Court, acknowledged this Court's ruling in *Stansbury v. California* and held proper standard to be whether there was a formal arrest or restraint on freedom of movement of the degree associated with a formal arrest), *cert. denied*, 516 U.S. 923 (1995); *State v. Tomasko*, 681 A.2d 922, 931 (Conn. 1996) (whether there was a formal arrest or restraint on freedom of movement of the degree associated with a formal arrest); *DeJesus v. State*, 655 A.2d 1180, 1190 (Del. 1995) (whether there was a formal arrest or restraint on freedom of movement of the degree associated with a formal arrest); *Davis v. State*, 698 So.2d 1182, 1188 (Fla. 1997) (whether there was a formal arrest or restraint on freedom of movement of the degree associated with a formal arrest), *cert. denied*, ___ U.S. ___, 118 S.Ct. 1076 (1998); *State v. Smith*, 546 N.W.2d 916, 922 (Iowa 1996) (whether there was a formal arrest or restraint on freedom of movement of the degree associated with a formal arrest); *State v. Carr*, 704 A.2d 353, 356-57 (Me. 1997) (whether constrained to degree associated with formal arrest at time of questioning); *Commonwealth v. Morse*, 691 N.E.2d 566, 570 (Mass. 1998) (whether freedom of action is curtailed to a degree associated with formal arrest); *State v. Champion*, 533 N.W.2d 40, 43 (Minn. 1995) (whether reasonable person would have believed he was in custody to degree associated with formal arrest, not whether he would believe he was free to leave); *State v. Johnson*, 669 A.2d 222, 226 (N.H. 1995) (whether there was a formal arrest or restraint on freedom of movement of the degree associated with a formal arrest); *State v. Elred*, 564 N.W.2d 283, 287 (N.D. 1997) (whether there was a formal arrest or restraint on freedom of movement of the degree associated with a formal arrest); *State v. Biros*, 678 N.E.2d 891, 904 (Ohio 1997) (whether there was a formal arrest or restraint on freedom of movement of the degree associated with a formal arrest), *reconsideration denied*, 680 N.E.2d 1023, *cert. denied*, ___ U.S. ___, 118

the custody test developed by this Court in *Mathiason, Beheler, McCarty, and Stansbury*, several other courts have applied either a "free to leave" test or some other test.

Several courts have ignored or misunderstood the development of this Court's "custody" test and have been applying a "free to leave" test similar to the test applied by the Supreme Court of North Carolina in *Jackson*. *Tankleff v. Senkowski*, 135 F.3d 235, 243-244 (2d Cir. 1988) (whether a reasonable person in suspect's position would have felt he was

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S.Ct. 574 (1997); *State v. Zelinka*, 882 P.2d 624, 631 (Or. Ct. App. 1993) (whether a reasonable person in situation would have understood himself, under the totality of the circumstances, to be in custody or under restraints comparable to those associated with a formal arrest), *review denied*, 888 P.2d 569 (1995); *State v. Easler*, 489 S.E.2d 617, 621 (S.C. 1997) (whether there was a formal arrest or restraint on freedom of movement of the degree associated with a formal arrest); *State v. Gesinger*, 559 N.W.2d 549, 551 (S.D. 1997) (whether there was a formal arrest or restraint on freedom of movement of the degree associated with a formal arrest); *State v. Smith*, 933 S.W.2d 450, 454 (Tenn. 1996) (whether there was a formal arrest or restraint on freedom of movement of the degree associated with a formal arrest); *State v. Mirquet*, 914 P.2d 1144, 1145-46 (Utah 1996) (whether a person's freedom of action is curtailed to a degree associated with formal arrest; the "not free to leave" standard, applicable to Fourth Amendment "seizure" issues, is broader than the Miranda standard); *Burket v. Commonwealth*, 450 S.E.2d 124, 129 (Va. 1994) (whether there was a formal arrest or restraint on freedom of movement of the degree associated with a formal arrest), *cert. denied*, 514 U.S. 1053 (1994); *State v. Ferguson*, 886 P.2d 1164, 1167 (Wash. Ct. App. 1995) (not whether a reasonable person would believe he was not free to leave, but rather, whether such a person would believe he was in police custody of the degree associated with formal arrest); *State v. Potter*, 478 S.E.2d 742, 752 (W. Va. 1996) (whether a reasonable person would believe his freedom of action was restricted to a degree associated with formal arrest);

not at liberty to terminate interrogation and leave); *United States v. Melvin*, 91 F.3d 1218, 1222 (9th Cir. 1996) (whether a reasonable person would have felt free to leave); *Houser v. State*, 678 N.E.2d 95, 101 (Ind. 1997) (whether a reasonable person would not feel free to leave); *Mosely v. State*, 495 S.E.2d 9, 12 (Ga. 1998) (whether a reasonable person would have felt he was not at liberty to terminate interrogation and leave); *State v. Moore*, 885 P.2d 457, 475 (Mont. 1994) (whether a reasonable person would feel free to leave); *Silva v. State*, 951 P.2d 591, 594 (Nev.1997) (whether a reasonable person would feel free to leave); *State v. Gumm*, 653 N.E.2d 253, 268 (Ohio 1995) (whether, under the totality of the circumstances, a reasonable person would have believed that he was not free to leave), *reconsideration denied*, 655 N.E.2d 742 (1995), *cert. denied*, 516 U.S. 1177, *reh'g denied*, 517 U.S. 1204 (1996); *State v. Jeffreys*, 682 A.2d 951, 953 (Vt. 1996) (whether a reasonable person would have felt free to leave or to refuse to answer police questions);

Some courts have been applying other tests which differ from this Court's test and from the "free to leave" test. *People v. Trujillo*, 938 P.2d 117, 123 (Colo. 1997) (a person is in custody not only when the person has been subjected to the constraints associated with a formal arrest, but also when a police interrogation is conducted under circumstances where the person interrogated has been deprived of his freedom of action in a significant way); *State v. Woods*, 942 P.2d 88, 94 (Mont. 1997) (a person is in custody or otherwise significantly deprived of freedom if inherently compelling pressures work to

undermine individual's will to resist and to compel him to speak where he would not otherwise do so freely); *State v. Dyer*, 513 N.W.2d 316, 319,321 (Neb. 1994) (whether a person was taken into custody or otherwise deprived of his freedom of action in any significant way); *State v. P.Z.*, 703 A.2d 901, 910 (N.J. 1997) (whether there has been significant deprivation of a person's freedom of action based on objective circumstances); *Commonwealth v. Rucci*, 670 A.2d 1129, 1139 (Pa. 1996) (whether a person is placed in a situation in which he reasonably believes that his freedom of action or movement is restricted by such interrogation), *stay granted*, 675 A.2d 1240 (1996), *cert. denied*, ___ U.S. ___, 117 S.Ct. 1257 (1997); *State v. Darby*, 556 N.W.2d 311, 319 (S.D. 1996) (whether a person is in custody or deprived of his freedom to leave); *Martinez v. State*, 943 P.2d 1178, 1181 (Wyo. 1997) (whether a person has been taken into custody or otherwise been deprived of his freedom of action in any significant way);

III. The Issue Presented Is National in Scope and Vital in Nature.

The "gain in specificity" resulting from the decision in *Miranda* "has been thought to outweigh the burdens that the decision in *Miranda* imposes on law enforcement agencies and the courts by requiring the suppression of trustworthy and highly probative evidence even though the confession might be voluntary under traditional Fifth Amendment analysis." *See, Fare v. Michael C.*, 442 U.S. 707, 718 (1979).

North Carolina's departure from the principles set forth by this Court for determining custody for Miranda purposes counteracts any gain from the prophylactic measures which this Court adopted to protect Constitutional rights while balancing the interests of law enforcement. The Supreme Court of North Carolina has confused the tests for "seizure" and "custody" and has imposed greater restrictions on police activity than this Court has imposed as a matter of federal constitutional law. Such action is improper when this Court has specifically refrained from doing so. *Oregon v. Hass*, 420 U.S. 714, 719 (1975). This departure from proper principles of determining "custody" counteracts this Court's purpose in establishing the Miranda rule and imposes additional burdens on law enforcement and the courts in North Carolina by requiring suppression of trustworthy and highly probative confessions which would be voluntary and admissible under Fifth Amendment and Miranda analysis by this Court. Several other state and federal courts have similarly failed to properly apply this Court's test for determining "custody."

To allow this confusion to go uncorrected with the resulting expansion of the meaning of "custody" beyond this Court's definition would be a travesty of justice. It "would ignore both *Miranda*'s mission and its only source of legitimacy" and would interfere unnecessarily with "the need for police questioning as a tool for effective enforcement of criminal laws." It would allow suppression of admissions of guilt made in circumstances less than those equivalent to formal arrest, even though such admissions "are essential to

society's compelling interest in finding, convicting, and punishing those who violate the law." *See, Moran v. Burbine*, 475 U.S. at 425-26.

This Court should grant the requested writ to eliminate the present confusion and inconsistency by making it clear to all of the courts of this country that "whether a reasonable person would consider himself free to leave under the totality of the circumstances" is the objective determination of custody only in the context of "formal arrest or restraint on freedom of movement of the degree associated with a formal arrest."

CONCLUSION

This Court should review and summarily reverse that portion of the judgment of the Supreme Court of North Carolina in *Jackson* which erroneously and impermissibly expanded the meaning of "custodial interrogation." *Stansbury* (reversal of state court judgment which was inconsistent with this Court's precedent and remand for reconsideration in light of this Court's opinion); *Pennsylvania v. Bruder*, 488 U.S. 9 (1988) (*per curiam* reversal of state court opinion which was contrary to ruling of this Court); *Beheler* (summary reversal of state court opinion which expanded this Court's meaning of custody); *Mathiason* (summary reversal of state court judgment which expanded this Court's meaning of custody). In the alternative, this Court should grant review and request briefing on this issue.

Respectfully submitted,

MICHAEL F. EASLEY
North Carolina Attorney General

William P. Hart*
Special Deputy Attorney General
N. C. Department of Justice
Post Office Box 629
Raleigh, North Carolina 27602
Telephone: (919) 716-6500

July 22, 1998

*Counsel of Record

APPENDIX

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OPINION OF THE SUPREME COURT OF NORTH CAROLINA, APRIL 3, 1998

[Caption Omitted in Printing]

Appeal as of right pursuant to N.C.G.S. § 7A-27(a) from a judgment imposing a sentence of death entered by Downs, J., at the 6 November 1995 Criminal Session of Superior Court, Buncombe County, upon a jury verdict of guilty of first-degree murder. The defendant's motion to bypass the Court of Appeals as to additional judgments for first-degree rape and first-degree kidnapping was allowed 17 July 1997. Heard in the Supreme Court 18 December 1997.

On 31 October 1994, Karen Styles went jogging and did not return. On 25 November 1994, her body was found nude from the waist down and taped to a tree. The defendant became a suspect in the commission of the crime, and on 20 December 1994, members of the Sheriff's Department requested that the defendant come to the sheriff's office with them. At the sheriff's office, the defendant made inculpatory statements. Subsequently, the defendant was charged in Buncombe County with the first-degree murder, first-degree kidnapping, and first-degree rape of Karen Styles.

Prior to the trial, the defendant made a motion to suppress his inculpatory statements. At the hearing on this motion, the testimony revealed the following essentially

OPINION, CONTINUED...

undisputed facts. Two detectives went to the defendant's place of work at 11:00 a.m. on 20 December 1994 and, after telling him he was not under arrest, requested that he accompany them to the sheriff's office to answer some questions. The defendant agreed and was then driven for a period of ten to twelve minutes from his place of work to the sheriffs office. The defendant was told he was a suspect in the murder of Karen Styles. The defendant denied any implication in the murder.

At the sheriff's office, the defendant was taken to the interview room and warned of his rights pursuant to *Miranda v. Arizona*, 384 U.S. 436, 16 L. Ed. 2d 694 (1966). He was again told he was not under arrest. The defendant then consented to a search of his person and to have fingerprints and blood and hair samples taken. The defendant was again told he was not under arrest. The defendant stated he wanted to cooperate and told the officers that he had a chemical imbalance in his brain and that he had been abused as a child.

In response to questioning, the defendant again stated he knew nothing about the murder of Karen Styles and denied owning a gun. The jail nurse came and took fingerprints and blood and hair samples from the defendant. After this, the defendant told the officers of his psychiatric problems -- his nervous breakdown, his discharge from the

OPINION, CONTINUED...

Navy for mental illness, his attempted suicides, and his depression. After the defendant had been questioned for approximately three hours, the sheriff entered the room at approximately 2:00 p.m. The sheriff asked the defendant, "What did you do with the rifle that Karen Styles was shot with?" A detective present at the time stated that the defendant replied by stating, "I think I need a lawyer present." The detective's handwritten notes, taken during the interview, read, "2:04 P.M. on 12-20-94, wants a lawyer present." The sheriff testified that the defendant said, "I think I might need a lawyer." The trial court found that the defendant stated, "I think I need a lawyer present."

In response to this statement, the sheriff told the defendant he did not want the defendant to answer any more questions, but he wanted to tell him something. The detective testified that the sheriff stated, "Son, I know you bought the rifle and the duct tape at K-Mart on the 28th of October. I know you were in Bent Creek on the day she was killed, and that's fine, but you need help." According to the detective, the defendant then began crying and stated, "But I didn't mean to kill nobody. I didn't." He continued crying, "I'm sorry; I didn't mean to kill her." The detective advised the defendant he needed to calm down, and after he did so, the sheriff and the detective left the defendant in the room and went to call an assistant district attorney for advice as to how to proceed. After speaking with the assistant district

OPINION, CONTINUED...

attorney, the detective and a captain with the Sheriff's Department returned and readvised the defendant of his *Miranda* rights. The defendant waived those rights and then made a statement admitting he killed Karen Styles.

The court concluded that there were no threats or inducements to make the statements; that the statements were made voluntarily and understandingly; and that the defendant knowingly, intelligently, and voluntarily waived his constitutional rights before making the statements to the officers. The motion to suppress the statement was denied.

The defendant was convicted of first-degree murder, first-degree rape, and first-degree kidnapping. Upon the jury's recommendation, the court imposed the death penalty for the murder conviction. The trial court imposed additional sentences of imprisonment for the rape and kidnapping convictions. The defendant appealed.

Michael F. Easley, Attorney General, by Jill Ledford Cheek, Assistant Attorney General, and Tina A. Krasner, Associate Attorney General, for the State.

Malcolm Ray Hunter, Jr., Appellate Defender, for defendant-appellant.

WEBB, Justice,

OPINION, CONTINUED...

The defendant contends that at the time his inculpatory statements were made, he was in custody and had invoked his right to counsel. He assigns error to the admission into evidence of these statements. This assignment of error has merit.

The State argues that the defendant's statement was properly admitted into evidence at trial because: (1) the defendant was not in custody at the time he stated he thought he needed a lawyer; and (2) even if the defendant was in custody, his statement was not an invocation of his Fifth Amendment right to counsel. We disagree.

If at any time during an interrogation of a person in custody the person invokes his right to counsel, the interrogation must cease, and it cannot be resumed without an attorney being present unless the defendant initiates a further discussion with the officers, *Edwards v. Arizona*, 451 U.S. 477, 68 L. Ed. 2d 378 (1981); *Miranda v. Arizona*, 384 U.S. 436, 16 L. Ed. 2d 694. A suspect is in custody when, considering the totality of circumstances, a reasonable person in the suspect's position would not feel free to leave. "This test is necessarily an objective one to be applied on a case-by-case basis considering all the facts and circumstances." *State v. Medlin*, 333 N.C. 280, 291, 426 S.E.2d 402, 407 (1993).

OPINION, CONTINUED...

We are faced with two questions. The first question is whether the defendant was in custody at the time he made his incriminating statements. The second question is whether the defendant, during the interrogation, invoked his right to counsel before he incriminated himself.

In determining the custody issue, we first note that the trial court made no finding as to whether the defendant was in custody when he made his statement in regard to needing a lawyer. However, the lack of such a finding does not prevent this Court from evaluating the evidence and deciding whether the defendant was in custody. *State v. Torres,* 330 N.C. 517, 525, 412 S.E.2d 20, 24 (1992).

In this case, we conclude that a reasonable person in the defendant's position when he was confronted by the sheriff would have felt he was in custody and would not have felt free to leave. The evidence showed that, at the request of two deputy sheriffs, the defendant accompanied them to the sheriff's office. While at the sheriff's office, the defendant consented to fingerprinting and gave blood and hair samples. He was under constant supervision. The defendant had told the officers he was anxious to return to work, and despite answering all questions from them and telling them he had no knowledge of the crime, he was never told that he was

OPINION, CONTINUED...

free to leave or that he would be given a ride to his home or place of work if he decided to leave.

After being in the interrogation room for a period of approximately three hours, during which time he was questioned by the officers in regard to the murder, had hair and blood samples taken, and was fingerprinted, a reasonable man at the least would have wondered whether he was free to leave. When the sheriff asked him what he had done with the rifle he had used to kill the victim, this informed the defendant that the sheriff thought he had committed murder. A reasonable man in the defendant's position who had been interrogated for approximately three hours and thought the sheriff believed he had committed murder would not have thought he was free to leave. He would have thought the sheriff intended to hold him for prosecution for murder. Thus, we hold that the defendant was in custody when he inquired about an attorney.

Having held that the defendant was in custody when he made his statement in regard to counsel, we must now determine whether the defendant articulated his desire for counsel sufficiently that a reasonable officer in the circumstances would have understood the statement to be a request for an attorney. *Davis* v. *United States,* 512 U.S.

OPINION, CONTINUED...

452, 129 L. Ed. 2d 362 (1994). The trial court found, based on sufficient evidence, that the defendant said, "I think I need a lawyer present." The State, relying on *Davis*, says that this statement was ambiguous and that the officers were not required to stop questioning the defendant. In *Davis*, the defendant said, "Maybe I should talk to a lawyer." Id. at 455, 129 L. Ed. 2d at 368. The United States Supreme Court held this was not a request for counsel.

Davis is not precedent for this case. The use of the word "[m]aybe" by the defendant in *Davis* connotes uncertainty. There was no uncertainty by the defendant. When he said, "I think I need a lawyer present," he told the officers what he thought. He thought he needed a lawyer. This was not an ambiguous statement. The interrogation should have stopped at that time.

We are reinforced in our decision by the notes of one of the officers which were made during the interrogation. The notes say, "2:04 P.M, on 12-20-94, wants a lawyer present." Although not binding on us, this is an indication of how a reasonable officer conducting an interrogation would have interpreted the defendant's statement.

We have held that the defendant was in custody and had invoked his right to counsel when he made his

OPINION, CONTINUED...

inculpatory statements. The inculpatory statements made to the detectives should have been excluded because they were made after the defendant invoked his right to counsel. The defendant did not initiate the communication that led to his statements, nor was his attorney present when they were made. Therefore, once the defendant had invoked his right to counsel, no further interrogation could occur.

We cannot hold beyond a reasonable doubt that the admission of this testimony was harmless. N.C.G.S. §15A-1443(b) (1988). Therefore, for this error, there must be a new trial.

In light of the fact that the defendant will receive a new trial, we do not discuss the defendants other assignments of error, for the questions they raise may not recur at a new trial. For the reasons stated in this opinion, the defendant must have a new trial.

NEW TRIAL.

Justice ORR did not participate in the consideration or decision of this case.

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JUDGMENT

[Caption Omitted in Printing]

This cause came on to be argued upon the transcript of the record from the Superior Court, Buncombe County. Upon consideration whereof, this Court is of the opinion that there is error in the record and proceedings of said Superior Court.

It is therefore considered and adjudged by the Court here that the opinion of the Court, as delivered by the Honorable John Webb, Associate Justice, be certified to the said Superior Court to the intent that a new trial is awarded.

And it is considered and adjudged further, that the costs of the appeal in this Court incurred, to wit, the sum of Six-hundred sixty-one and 75/100 dollars ($661.75), have been previously paid.

Certified to the Superior Court, Buncombe County, this the 23rd day of April 1998.

A TRUE COPY

SEAL

CHRISTIE SPEIR CAMERON
Clerk, Supreme Court of North Carolina
By: /s/ Carol B. Templeton
Assistant Clerk

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TRANSCRIPT OF ORAL ORDER OF TRIAL JUDGE, NOVEMBER 3, 1995

[403] That's what we say is suppressible. The permissions and everything done before that time, I can't argue about that.

Does that answer the Court's question?

COURT: I think so. Any further argument?

MR. MOORE: Judge, the only additional thing I would say is Mr. Stewart referred to *Maine vs. Molton*. That appears to be a Sixth-Amendment case where, after somebody has been indicted and his Sixth-Amendment rights attach, they wire an informant. And there, the Court talks about deliberately trying to. This is a Fifth-Amendment case. The *Allen* case, the defendant was not taken anywhere. He said he didn't want to talk. The officer said, "Well, if you decide you want to talk, call us. We're going to take you to jail now." He said at that point right there, same interview, that he was ready to talk.

COURT: Any further argument?

MR. STEWART: Not from the defendant, your Honor.

MR. MOORE: No, sir.

COURT: Let the record reflect, upon a motion being timely filed by the defendant through his counsel, a Motion to

ORAL ORDER, CONTINUED...

Suppress a statement made by the defendant during the time that he was detained at the sheriff's department here in Buncombe County on December 20, 1994, that the matter was conducted outside the presence of the jury or a prospective jury; that the defendant was present in open court and [404] accompanied by his counsel. The State was represented by counsel, as well. The Court has had the opportunity to see and observe any and all witnesses called on this question and to determine what weight or credibility ought to be given each respective witness's testimony; that in addition to that, the Court finds the following facts: That on or about December 20th, 1994, that Detective Bradford of the Buncombe County Sheriff's Department, along with another detective, went to the Mountain View restaurant on Brevard Road here in Buncombe County for the purpose of meeting and ultimately interrogating the defendant; that the defendant was working at that restaurant, and that when they encountered him, they displayed no badges nor weapons; the defendant was dressed, and at that time had a full beard; that he was told that the -- at that time, the defendant was told he was not under arrest, but that they wanted to -- for him to come with them and answer some questions, and he agreed, and the officers transported him in a vehicle that was not customarily used to transport people who are arrested or people who are in custody, and, in fact, the defendant sat in the front seat of the vehicle on the way to the Buncombe County Sheriff's Department, which trip took about ten to twelve minutes from the restaurant to the sheriff's

ORAL ORDER, CONTINUED...

department. There was some considerable conversation between the two detectives and the defendant in the confines of the vehicle. The defendant was told that he [405] was going for an interview, that his name had come up as a suspect in the death of Karen Styles, at which time the defendant denied any knowledge or involvement with that occurrence. After arriving at the Buncombe County Sheriff's Department, the defendant was advised of his constitutional rights with regard to making any statement, which is fully contained on Suppression Exhibit 1, and the Court makes reference to that as if more fully set out in the process rendered. The defendant acknowledged those rights, that he did not invoke any of those rights, that he waived those rights, and he, in fact, signed that form. That at the time he was not a juvenile; that he gave information regarding his date of birth, the date of birth of his wife, all of which was verified to be correct; that he was first advised that he was not under arrest; that he was not handcuffed; that he was not physically detained, although this entire process of interrogation took place in the confines of the Buncombe County Sheriff's Department; that the defendant appeared to be physically fit at the time of the interrogation; that he did not appear to be under the influence of any alcohol or drugs or medicines or pills or any intoxicants; that at one particular time he asked for permission -- asked if he could use the restroom. He was given directions to the restroom, unaccompanied to it, and he went and returned. Also during the course of the time he was there, that he was fingerprinted [406] and palm printed.

ORAL ORDER, CONTINUED...

And then after those procedures were accomplished, he was taken to another room to conduct a further interview, at which time the then-elected Sheriff of Buncombe County indicated a desire to talk to the defendant himself and inject himself into the interrogation process, and that the Sheriff asked a question which essentially stated what did defendant do with the rifle that he used in connection with Karen Styles' death, or words to that effect, to which the defendant began to cry and state that he didn't mean to kill anyone, and then to which the response to the Sheriff's question was the defendant said, "I think I need a lawyer." And the Sheriff responded -- the elected Sheriff responded by saying, "There will be no more questions asked of him," but that if he did get a lawyer, to inform him that he knew -- that the officers knew that he had acquired a gun as well as duct tape at K-Mart, at which time the defendant reinitiated conversation with the officers, and that he began to cry and state that he did not mean to kill anyone. The officers took a momentary break, called the district attorney in Buncombe County, and then, upon that conversation, came back to the defendant and readvised him entirely of his Miranda rights. And the defendant acknowledged that he understood those rights, and further, did not invoke any of those rights, that being Suppression Exhibit No. 4, and that he signed the form indicating that he had had the rights read to [407] him and that he understood them, and that he did not invoke any of them. He was still not arrested. He was still not in handcuffs, albeit he was still at the Buncombe County Sheriff's Department.

ORAL ORDER, CONTINUED...

He then rendered a verbal statement that was written by Detective Bradford, and later, within a day, transcribed to a typewritten -- in a typewritten form; that the answers to all questions asked throughout the day by the defendant, whether it had anything to do with the investigation of the death of the late Miss Styles or anything else, the answers of the defendant were reasonable and that he responded to any questions asked.

Based on that, the mental condition of the defendant appeared to be coherent and not confused; that there were no threats or suggested violence or show of violence by law enforcement officers to persuade or induce the defendant to make or continue to make a statement or the lack of a statement. There were no promises, offers of reward or inducement by law enforcement officers for the defendant to make a statement or the lack thereof, and based on the totality of the circumstances of the interview, the Court concludes that none of the constitutional rights, either federal or state, of the defendant were violated by his detention, his interrogation or the statement that he rendered.

The Court further concludes no promises, offer of reward [408] or inducement to the defendant were made to make a statement. The Court further concludes there were no threats or suggested violence or show of violence to persuade or induce the defendant to make a statement; that the statement made by the defendant on December 20, 1994, to Officer -- Detective Bradford was made voluntarily, freely and

ORAL ORDER, CONTINUED...

understandingly; that the defendant was in full understanding of his constitutional rights to remain silent, right to counsel and all other rights, and that he freely, knowingly, intelligently and voluntarily waived each of those rights, and therefore made the statement to the officer -- to wit, Detective Bradford.

Based on that, the Motion to Suppress the statement made by the defendant to Detective Bradford is denied. Exception noted by the defendant.

Furthermore, the permission to search his home and any vehicle or vehicles and other matters or items of property in connection with that particular -- as enumerated and listed in that permission form, the Motion to Suppress that is also denied and exception noted by the defendant. The contents of the statement will not be revealed at this time until such time as it comes on before the jury, should it be offered as evidence in this case. Whatever weight is to be given the statement will be given by the jury at that time.

MS. DREHER: Thank you, your Honor.

Supreme Court, U.S.
FILED
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OFFICE OF THE CLERK

(2)

No. 98-203
IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1997

STATE OF NORTH CAROLINA,
Petitioner,

v.

RICHARD ALLEN JACKSON,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE NORTH CAROLINA SUPREME COURT

BRIEF FOR *AMICI* STATES OF OHIO, ALABAMA, ALASKA, ARIZONA, COLORADO, CONNECTICUT, DELAWARE, HAWAII, IDAHO, ILLINOIS, KANSAS, LOUISIANA, MARYLAND, MICHIGAN, MINNESOTA, MISSISSIPPI, MONTANA, NEBRASKA, NEVADA, NEW HAMPSHIRE, NEW JERSEY, OKLAHOMA, RHODE ISLAND, SOUTH CAROLINA, SOUTH DAKOTA, TENNESSEE, UTAH, VERMONT, WASHINGTON, WISCONSIN, THE COMMONWEALTH OF PENNSYLVANIA AND THE TERRITORIES OF GUAM AND U.S. VIRGIN ISLANDS IN SUPPORT OF PETITIONER

BETTY D. MONTGOMERY
Attorney General of Ohio
JEFFREY S. SUTTON
State Solicitor
Counsel of Record
STEPHEN P. CARNEY
KIMBERLY L. CHARLES
Assistant Attorneys General
30 E. Broad Street, 17th Floor
Columbus, Ohio 43215-3428
(614) 466-8980

COUNSEL FOR AMICI STATES AND TERRITORIES

20 pp

BILL PRYOR
Attorney General
State of Alabama

BRUCE M. BOTELHO
Attorney General
State of Alaska

GRANT WOODS
Attorney General
State of Arizona

GALE A. NORTON
Attorney General
State of Colorado

JOHN M. BAILEY
Chief State's Attorney
State of Connecticut

M. JANE BRADY
Attorney General
State of Delaware

GUS F. DIAZ
Attorney General
Territory of Guam

MARGERY S. BRONSTER
Attorney General
State of Hawaii

ALAN G. LANCE
Attorney General
State of Idaho

JAMES E. RYAN
Attorney General
State of Illinois

CARLA J. STOVALL
Attorney General
State of Kansas

RICHARD P. IEYOUB
Attorney General
State of Louisiana

J. JOSEPH CURRAN, JR.
Attorney General
State of Maryland

FRANK J. KELLEY
Attorney General
State of Michigan

HUBERT H. HUMPREY III
Attorney General
State of Minnesota

MICHAEL C. MOORE
Attorney General
State of Mississippi

JOSEPH P. MAZUREK
Attorney General
State of Montana

DON STENBERG
Attorney General
State of Nebraska

FRANKIE SUE DEL PAPA
Attorney General
State of Nevada

PHILIP T. McLAUGHLIN
Attorney General
State of New Hampshire

PETER VERNIERO
Attorney General
State of New Jersey

W.A. DREW EDMONDSON
Attorney General
State of Oklahoma

D. MICHAEL FISHER
Attorney General
Commonwealth of Pennsylvania

JEFFREY B. PINE
Attorney General
State of Rhode Island

CHARLES M. CONDON
Attorney General
State of South Carolina

MARK BARNETT
Attorney General
State of South Dakota

JOHN KNOX WALKUP
Attorney General
State of Tennessee

JULIO A. BRADY
Attorney General
Territory of U.S. Virgin Islands

JAN GRAHAM
Attorney General
State of Utah

WILLIAM H. SORRELL
Attorney General
State of Vermont

CHRISTINE O. GREGOIRE
Attorney General
State of Washington

JAMES E. DOYLE
Attorney General
State of Wisconsin

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STATEMENT OF AMICI INTEREST

Amicus curiae State of Ohio and 32 other amici States and Territories join North Carolina in urging the Court to grant the petition for certiorari. At stake is whether the "free to leave" test for ascertaining whether an individual has been seized for Fourth Amendment purposes governs the inquiry whether an individual is in custody for Fifth Amendment purposes.

The amici States care about this issue for several reasons. To begin with, the lower-court decision threatens to sow uncertainty in an area that once had relative clarity. By and large State and federal courts have been careful to distinguish between Fourth Amendment inquiries into whether an individual has been seized and Fifth Amendment inquiries into whether an individual's self-incrimination rights have been infringed. Yet, by applying the same verbal formula in both settings – whether a reasonable person would feel "free to leave" under the totality of the circumstances – the lower court decision has blurred a long-accepted line between the distinct inquiries into whether a person has been seized or is in custody.

More than just uncertainty, however, explains the amici States' unified opposition to the decision below. It will immediately unsettle law enforcement efforts in North Carolina and carries the risk of unsettling law enforcement efforts elsewhere in the event other State and federal courts import this method of analysis. The most immediate impact of the decision on law enforcement is this: If individuals are in custody whenever they do not feel free to leave, that means that police must give *Miranda* warnings whenever a Fourth Amendment seizure has occurred. That of course has never been the law. And it is no overstatement to suggest that this development, left unreviewed, could significantly curb well-meaning and until now well-accepted law enforcement practices. It would mean that every *Terry* stop would have to be accompanied by *Miranda* warnings. Nor would this development necessarily be a plus for individuals suspected of crime. Once the line between these

inquiries becomes blurred, it is not clear why courts will not make a similar mistake in the opposite direction. If the custody and seizure tests become one, in other words, courts may just as easily (and just as incorrectly) export aspects of the custody inquiry into the lower threshold of the Fourth Amendment seizure inquiry.

Perhaps above all other reasons for granting the petition, the lower-court decision warrants review because it is wholly incompatible with a series of decisions from this Court. Case after case holds that police need not give *Miranda* warnings whenever an individual has been seized for Fourth Amendment purposes. While State Supreme Courts are free to experiment with new ways of balancing the collective security interests of their society against the liberty interests of their individual citizens, they cannot do so in interpreting the U.S. Constitution. Still less may they do so when their interpretation directly contradicts decisions of this Court. For these reasons and those added below, the amici States respectfully submit this brief for the Court's consideration.

REASONS FOR GRANTING THE WRIT

At issue before the North Carolina Supreme Court was whether respondent was in custody at the time he confessed to murdering a 22 year old woman. The court correctly determined that if respondent was in custody at the time of the confession and if he had already clearly invoked his right to counsel at that time, then the ensuing confession would have to be suppressed. In the eyes of the lower court, however, the custody determination must be framed as follows: "A suspect is in custody when, considering the totality of circumstances, a reasonable person in the suspect's position would not feel *free to leave*." Petition for Writ of Certiorari ("Pet.") 5a (emphasis added). There is no mistaking the "free to leave" orientation of the court's inquiry or the federal ground on which it relies. The

court repeats this verbal formulation at every turn in the analysis. After announcing this understanding of the custody test at the outset, it says "we conclude that a reasonable person in the defendant's position when he was confronted by the sheriff would have felt he was in custody and would not have felt free to leave." Pet. 6a. It then notes that "he was never told that he was free to leave." Pet. 7a. Then again: After being in the interrogation room for a period of time, "a reasonable man *at the least* would have wondered whether he was free to leave." Pet. 7a. (emphasis added). And the coda: "A reasonable man in the defendant's position . . . would not have thought he was free to leave." Pet. 7a. Because this analysis is wrong, threatens to undercut and confuse legitimate law enforcement efforts, and conflicts with decisions of other lower courts, it should be reviewed and reversed.

I. UNDER THE FIFTH AMENDMENT, CUSTODY FAILS TO ARISE WHENEVER INDIVIDUALS DO NOT FEEL "FREE TO LEAVE."

As the lower court recognized, the obligation to provide *Miranda* warnings, as well as the obligation to terminate questioning upon the invocation of the right to counsel, *see Edwards v. Arizona*, 451 U.S. 477 (1981), *Miranda v. Arizona*, 384 U.S. 436 (1966), Pet. 5a, applies "only where there has been such a restriction on a person's freedom as to render him 'in custody.'" *Oregon v. Mathiason*, 429 U.S. 492, 495 (1977)(per curiam). In determining what rises to the level of custody for purposes of these obligations, however, this Court has taken a very different path from the lower court.

From *Miranda* forward, the Court has looked not to whether the individual felt "free to leave" but to whether he or she had actually been arrested or so restricted in their movement as essentially to be under arrest. In *Miranda* itself, the Court defined "custodial interrogation" as occuring when "a person

has been taken into custody or otherwise deprived of his freedom of action in any significant way." 384 U.S. at 444. In decision after decision since then, the Court has said that the "ultimate inquiry is simply whether there [was] a 'formal arrest or restraint on freedom of movement' of the degree associated with a formal arrest." *Stansbury v. California*, 511 U.S. 318, 322 (1994)(per curiam) (quoting *California v. Beheler*, 463 U.S. 1121, 1125 (1983) (per curiam) (quoting *Mathiason*, 429 U.S. at 495)). *See also Berkemer v. McCarty*, 468 U.S. 420, 440, 442 (1984) (custody occurs only when a suspect's "freedom of action is curtailed to a degree associated with formal arrest" or there has been the "functional equivalent of formal arrest") (internal quotation omitted). The clear precedent set by this Court, and until now followed almost uniformly by courts across the nation, is that indicia of a formal arrest must accompany questioning or detention by law enforcement officers to support a finding that an individual is "in custody" for *Miranda* purposes. *See United States v. Erving*, 1998 U.S. App. LEXIS (June 26, 1998, 10th Cir.); *United States v. Sullivan*, 138 F.3d 126 (4th Cir. 1998); *United States v. Salvo*, 133 F.3d 943 (6th Cir.) *cert. denied*, 118 S. Ct. 1805 (1998); *Feltrop v. Bowersox*, 91 F.3d 1178 (8th Cir. 1996) *cert. denied*, 117 S. Ct. 1849 (1997); *United States v. Murray*, 89 F.3d 459 (7th Cir. 1996); *United States v. Kelly*, 991 F.2d 1308 (7th Cir. 1993); *United States v. Knox*, 839 F.2d 285 (6th Cir. 1988) *cert. denied*, 490 U.S. 1019 (1989). In custody determinations, a court must consider all of the circumstances surrounding the interrogation from an objective viewpoint, "not [from] the subjective views harbored by either the interrogating officer or the person being questioned." *Stansbury*, 511 U.S. at 322, 323.

The Court, moreover, has applied this well-established test to settings in which individuals, like respondent here, were interrogated in a criminal investigation. Consider the facts of *Mathiason*. The individual voluntarily obliged a police officer's

request to come to the police station for questioning, was told he was not under arrest but was a suspect in a burglary, and was falsely told that police had incriminating evidence against him. The Oregon Supreme Court held that although the individual was not arrested or otherwise formally detained, he was questioned under "coercive" circumstances that triggered his *Miranda* rights and his confession was obtained in violation of Fifth Amendment principles. But "[a]ny interview of one suspected of a crime by a police officer," this Court observed in reversing the decision of the Oregon Supreme Court, "will have coercive aspects to it, simply by virtue of the fact that the police officer is part of a law enforcement system which may ultimately cause the suspect to be charged with a crime." 429 U.S. at 495. For these reasons, the Court concluded, "police officers are not required to administer *Miranda* warnings to everyone whom they question" and *Miranda* does not apply "simply because the questioning takes place in the station house, or because the questioned person is one whom the police suspect." *Id.* In the end, the Court held that "Miranda warnings are required only where there has been such a restriction on a person's freedom as to render him 'in custody.'" *Id.*

For like reasons, the Court in *California v. Beheler* summarily reversed a decision of the California Court of Appeals. There, the state court found custody on the grounds that the interview took place at the police station, the individual was a suspect, and the goal of the interview was to produce incriminating evidence. As in *Mathiason*, however, the individual went to the police station voluntarily, and was told by law enforcement officers that he was not under arrest. Again, this Court held that the "totality of circumstances" on which the lower court focused did not support a finding that the individual was arrested or otherwise formally restrained, and that the confession was validly obtained. *Id.*

The decision of the North Carolina Supreme Court repeats mistakes of the past -- specifically, those of the Oregon Supreme Court in *Mathiason* and of the California Court of Appeals in *Beheler*. Instead of focusing on whether the suspect had been arrested in fact or in effect, the court focused solely on whether a reasonable person in his shoes would have felt "free to leave." This interpretation of the Fifth Amendment lacks support from a single holding of this Court. It should be summarily reversed.

II. THE LOWER COURT DECISION MISTAKENLY MERGES THIS COURT'S CUSTODY AND SEIZURE INQUIRIES.

The lower court decision not only makes new law, but also merges two distinct Fourth and Fifth Amendment concepts. There has long been, and continues to be, a distinction between whether an individual has been seized for Fourth Amendment purposes and whether an individual has been placed in custody for Fifth Amendment purposes.

The Fourth Amendment protects individuals from unreasonable searches and seizures or other "'arbitrary and oppressive interference by enforcement officials with the privacy and personal security of individuals.'" *United States v. Mendenhall*, 446 U.S. 544, 553-554 (1980)(citing *United States v. Martinez-Fuerte*, 428 U.S. 543, 554 (1976)). An individual is "'seized" only when, by means of physical force or a show of authority, his freedom of movement is restrained." *Id.* at 553. In *Mendenhall* this Court held that for Fourth Amendment purposes a "seizure" occurs "only if, in view of all the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave." *Id.* at 554; *see also Michigan v. Chesternut*, 486 U.S. 567, 573 (1988) ("the Court has since embraced this test"); *INS v. Delgado*, 466 U.S. 210, 215 (1984); *Florida v. Royer*, 460 U.S. 491, 502

(1983)(plurality opinion); *Florida v. Bostick*, 501 U.S. 429, 439 (1991)(setting forth a variant of the *Mendenhall* test: "whether a reasonable person would feel free to decline the officers' requests or otherwise terminate the encounter"). It is this test that the North Carolina Supreme Court applied to a custody determination for Fifth Amendment purposes.

Yet it remains well-established under this Court's precedents that there is a distinction between a Fourth Amendment "seizure" and Fifth Amendment "custody." In *Berkemer*, the Court faced the question head on. At stake was whether a routine traffic stop of a motorist constituted a custodial interrogation requiring recitation of *Miranda* rights. In that case, a state highway patrolman forced the motorist to stop his vehicle upon observing it weave in and out of its lane of traffic. 468 U.S. at 423. The officer asked the driver to exit the vehicle and, upon noticing that the driver had difficulty standing, came to the undisclosed conclusion that he would charge the driver with a traffic offense and take him into custody. *Id.* The officer asked the driver to perform a field sobriety test, and when the driver could not complete the test, asked him whether he had been using intoxicants. *Id.* The driver replied that he had, at which point he was formally arrested, taken to the county jail, and subjected to further questioning that resulted in incriminating information. At no time was the driver advised of his *Miranda* rights. *Id.* at 424. Upon being charged with operating a motor vehicle under the influence of alcohol or drugs, the driver moved to exclude all incriminating statements on the ground that they were elicited in violation of his Fifth Amendment rights. *Id.*

The Court accepted certiorari of the case in order to resolve the ambiguity and "confusion in the federal and state courts" regarding "the time at which the Miranda doctrine becomes applicable" in a traffic stop of a detained motorist who has not been arrested. 468 U.S. at 420, 426. Likening the

routine traffic stop to a brief detention of an individual permitted by *Terry v. Ohio*, 392 U.S. 1 (1968), the Court stated: "we have long acknowledged that 'stopping an automobile and detaining its occupants constitute a 'seizure' within the meaning of [the Fourth] Amendmen[t], even though the purpose of the stop is limited and the resulting detention quite brief.'" 468 U.S. at 436-37 (citing *Delaware v. Prouse*, 440 U.S. 648, 653 (1979)). The Court then held that individuals "temporarily detained" pursuant to traffic stops are not in custody for Fifth Amendment purposes. *Id.* at 440. *See also Pennsylvania v. Bruder*, 488 U.S. 9 (1988).

As *Berkemer* confirms, a seizure does not rise to the level of a custodial detention. Indeed, the Court went on to analyze the traffic stop under the *Mathiason* test: whether there was evidence to show that the motorist's "freedom of action [was] curtailed to a 'degree associated with formal arrest,'" *id.* (citing *Beheler*, 463 U.S. at 1125), thus entitling the motorist "to the full panoply of protections prescribed by Miranda." *Id.* In holding that Berkemer's prearrest statements to the police were not the product of a custodial interrogation, the Court considered the surrounding circumstances, including the brief duration of the stop prior to the arrest, the few questions posed by the officer, and the routine request for a field sobriety test -- all of which are common to a stop based upon suspicion of an intoxicated driver -- and found that the situation could not "fairly be characterized as the functional equivalent of a formal arrest." *Id.* at 442.

More recently, the Court confirmed the distinction between Fourth Amendment and Fifth Amendment rights in *Ohio v. Robinette*, 519 U.S. 33, 117 S.Ct. 417 (1996), though this time from an opposite perspective. *Robinette* was a Fourth Amendment, not a Fifth Amendment, case, but in essence it also threatened to conflate the two separate bodies of jurisprudence. In *Robinette*, the lower court held that a lawfully seized

defendant must be warned that he is "free to go" before his consent to search, or any "consensual interrogation," could be recognized as voluntary. *Id.* at 419-20. The Court reversed, rejecting the attempt to impose a *Miranda*-style prophylactic rule in a Fourth Amendment setting. *Id.* at 421. *See also Schneckloth v. Bustamonte*, 412 U.S. 218 (1973) (also rejecting per se requirement that defendants must know that they can refuse a request to search). Thus, *Robinette* and *Berkemer* both confirm, albeit from different directions, the importance of distinguishing Fourth and Fifth Amendment modes of analysis.

The decisions of this Court have not only set forth distinct tests for "seizure" and "custody" determinations -- *see Salvo, supra; Berkemer, supra; and Knox, supra* -- they also have provided a framework for determining what constitutes the "functional equivalent of a formal arrest" for Fifth Amendment purposes. Indicia of a formal restraint on an individual's freedom of action at least include whether the individual voluntarily subjects himself to questioning by law enforcement authorities; whether an individual's freedom of action is restricted while subjected to questioning and whether he can leave at the conclusion of the interrogation; and whether the individual is told that he is a suspect in an investigation. *See Mathiason, supra; Beheler, supra; Berkemer; supra; Stansbury; supra.* The determination of what circumstances constitute the "functional equivalent of a formal arrest" depends, at least in part, upon how a reasonable person in the suspect's position interprets the situation.

Unlike the North Carolina Supreme Court, other lower courts have been careful to use the "free to leave" inquiry as but one factor in the broader determination of whether a defendant was "in custody" for *Miranda* purposes. *See Salvo, supra* at 950 (holding that for purposes of a Fifth Amendment custody determination, courts may consider the "free to leave" inquiry as one aspect of the totality of the circumstances, though the

inquiry is "not necessarily an ultimate or even dispositive" one); *United States v. Hocking*, 860 F.2d 769, 773 (7th Cir. 1988)(partially reversed on other grounds)(in determining whether the accused was subject to custodial interrogation, the court should consider the totality of the circumstances, including the accused's freedom to leave the scene). But these courts have been vigilant not to collapse the custody inquiry into a "free to leave" analysis. Some courts have been careful specifically to disavow any equating of "custody" and "seizure." *See United States v. Streifel*, 781 F.2d 953 (1st Cir. 1986)(district court mistakenly thought that the principal criterion for determining whether the defendants were in custody for *Miranda* purposes was "free to leave" determination).

III. THE LOWER COURT DECISION CONFLICTS WITH A WIDE ARRAY OF OTHER LOWER COURT DECISIONS AND THREATENS TO DISRUPT LEGITIMATE LAW ENFORCEMENT EFFORTS.

The North Carolina Supreme Court's decision exacerbates a growing split of authority, as it is not the only court to have erroneously used a "free to leave" test in determining custody. Both state and federal courts have made the same mistake. *See United States v. Lee*, 699 F.2d 466, 468 (9th Cir. 1982) ("In such circumstances a reasonably innocent person could conclude that he was not free to leave"); *State v. Moore*, 885 P.2d 457, 475 (Mont. 1994)("If a reasonable person does not feel free to leave, then the examination is custodial.").

Several other courts have in *dicta* indicated that the "free to leave" language is the sole test of "custody," and many of these courts are likely poised to repeat North Carolina's error. For example, the Ohio Supreme Court confused the Fourth Amendment and Fifth Amendment notions of "seizure" and

"custody" in *State v. Gumm*, 653 N.E.2d 253 (Ohio 1995) *cert. denied*, 516 U.S. 1177 (1996). In *Gumm*, this confusion is shown not only by the court's recital of the "free to leave" language as the custody test, but by its citation to this Court's *Mendenhall* and *Bostick* decisions -- which are solely Fourth Amendment seizure cases -- as support for that test. *See id.* at 268. In *Gumm*, however, the Ohio court avoided an erroneous "custody" holding by happenstance, as "the state did not proffer into evidence any statements" made in the disputed "custody" situation, and thus the court did not need to actually apply the custody test. *Id.*

Likewise, the Indiana Supreme Court adopted a "free to leave" test, but it too blunted the effect of its error on other grounds. *See State v. Houser*, 678 N.E.2d 95, 101-02 (Ind. 1997). In *Houser*, the court applied a free to leave test and suggested that custody had occurred. *Id.* However, the court did not rule conclusively, as the defendant had later repeated his pre-*Miranda* statements after *Miranda* warnings were given, rendering any error in admitting the pre-*Miranda* statements harmless. *Id.*

Similarly, other courts have applied a "free to leave" custody test, but have gone on to find that the defendant in question was in fact free to leave, and thus was not in custody. *See, e.g., Mosely v. State*, 495 S.E.2d 9, 12-13 (Ga. 1998) (test is "whether a reasonable person would have felt he or she was not at liberty to terminate the interrogation and leave"); *Silva v. State*, 951 P.2d 591, 594 (Nev. 1997) ("[t]he test for whether one is in custody is if a reasonable person would believe he was free to leave"); *State v. Jeffreys*, 682 A.2d 951, 953 (Vt. 1996) (test is "if a reasonable person would have felt free to leave or to refuse to answer police questions"). These cases may well have reached the right result, though by applying the wrong test, as someone free to leave is likely not in custody. But the plain adoption of the "free to leave" test means that an erroneous

custody finding awaits merely a different set of facts. *Compare United States v. Melvin*, 91 F.3d 1218, 1222 (9th Cir. 1996) (custody occurs if "a reasonable person would believe that he is not free to leave," but no custody on these facts) and *United States v. Lee*, *supra*, 699 F.2d at 468 (Ninth Circuit applying same test and finding custody).

On the other side of this split, there are of course many more courts that properly apply the "arrest or indicia of arrest" test in determining custody. *See, e.g., United States v. Gonzalez*, 121 F.3d 928, 939-40 (5th Cir. 1997), *cert. denied*, 118 S.Ct. 726 (1998); *United States v. Glover*, 104 F.3d 1570, 1578 (10th Cir. 1997); *Commonwealth v. Morse*, 691 N.E.2d 566, 570 (Mass. 1998); *State v. Easler*, 489 S.E.2d 617, 621 (S.C. 1997). *See also* Pet. at 19-21, n. 2.

In light of the real-world consequences of this error, and in light of the clear nature of the lower court's error, the amici States join the State of North Carolina in urging the Court summarily to reverse the lower court's decision, or in the alternative to grant the writ and hear the case in full.

CONCLUSION

For the foregoing reasons, the amici States respectfully urge the Court to grant the writ.

Respectfully submitted,

BETTY D. MONTGOMERY
Attorney General of Ohio
JEFFREY S. SUTTON
State Solicitor
Counsel of Record
STEPHEN P. CARNEY
KIMBERLY L. CHARLES
Assistant Attorneys General
30 E. Broad Street, 17th Floor
Columbus, Ohio 43215-3428
(614) 466-8980

COUNSEL FOR AMICI STATES AND TERRITORIES

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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1997

STATE OF NORTH CAROLINA,
Petitioner,

v.

RICHARD ALLEN JACKSON,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF NORTH CAROLINA

RESPONDENT JACKSON'S BRIEF IN OPPOSITION

MALCOLM RAY HUNTER, JR.
APPELLATE DEFENDER

Office of the Appellate Defender
123 West Main Street, Suite 600
Durham, North Carolina 27701
Telephone: (919) 560-3334

14pp

CAPITAL CASE

QUESTION PRESENTED

1. **Whether the North Carolina Supreme Court Correctly Applied this Court's Test for Determining Whether Incriminating Statements Were Elicited in the Course of Custodial Interrogation?**

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RICHARD ALLEN JACKSON,
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RESPONDENT JACKSON'S BRIEF IN OPPOSITION

Respondent Richard Allen Jackson respectfully opposes and requests that this Court deny the Petition for Writ of Certiorari filed by petitioner seeking review of the decision of the Supreme Court of North Carolina in *State v. Jackson*, 497 S.E.2d 409 (N.C. 1998).

OPINIONS BELOW

JURISDICTION

CONSTITUTIONAL AMENDMENTS AND STATUTES INVOLVED

Pursuant to Rules 15.2 and 24.2, these items are omitted since respondent is satisfied with petitioner's statements of the OPINIONS BELOW, JURISDICTION, and CONSTITUTIONAL AMENDMENTS AND STATUTORY PROVISIONS.

STATEMENT OF THE CASE

On the morning of December 20, 1994, Respondent Richard Allen Jackson was confronted at work in front of customers and co-workers by two detectives from the Sheriff's Department of Buncombe County, North Carolina. (Tpp. 266-68) Respondent was told that he was not under arrest, but he was asked to leave his workplace to accompany the detectives for questioning regarding the death of Karen Styles. (Tp. 268) Respondent explained to a fellow employee that he would be back to work soon, and was escorted to the detectives' unmarked police car. (Tpp. 264-269) Before allowing Respondent to enter the car, the detectives determined that he carried no "weapons or pocket knife of any type." (Tp. 270)

Once Respondent was alone with the detectives in their vehicle, they told him that he was a suspect in the case. Respondent said he had nothing to do with it. (Tpp. 272-73) One detective commented that he enjoyed hunting in the Bent Creek recreation area in which Ms. Styles' body was discovered, and asked Respondent whether he did any hunting. Respondent had already denied knowing the recreation

area, and stated that he had not owned a gun for two years. (Tpp. 273-74) The detectives had evidence connecting Respondent to the Bent Creek area, and to the purchase of a .22 caliber rifle and ammunition at a Kmart three days before Ms. Styles' death. (Tpp. 56, 175) The cause of death had been determined to be a small caliber rifle wound to the head. (Tp. 574)

On arriving at the Sheriff's Department, Respondent was ushered to a small basement room filled with a large table and several chairs. The only visual access out of the room was through a single window looking out through blinds onto an interior hallway. The detectives began the interrogation a few minutes after 11:00 a.m., and kept Respondent under constant supervision throughout the several hours of questioning that followed. (Tpp. 274-75, 310)

Within ten minutes, Respondent had cooperated by signing a waiver of his *Miranda* rights. He had also agreed to provide evidence for the case by being photographed and physically searched, and by providing not only prints from his fingers and palms but also samples of his blood and saliva, along with hair from his head, armpits, chest, forearms, pubic area, and legs. In addition, he consented to the search of his home, which he shared with his wife and two young children. (Tpp. 276-80, 320, 487) Having signed these consent and waiver forms, Respondent was waiting to provide the evidence requested when he was again told that he was not under arrest. Respondent stated that he wanted to cooperate in order to get back to work. (Tp. 282)

During questioning, Respondent revealed that he had a history of mental breakdowns and suicide attempts. He stated that he had been shuttled between eight different foster homes as a child and suffered abuse in one of them. He explained that he spent two months in a mental hospital during high school, and that upon graduation he had joined the Navy, only to be discharged after six months with a recommendation that he see a psychiatrist. He described himself as frequently depressed, and as "just collaps[ing] under pressure." (Tpp. 202-03)

Following this exchange, Respondent provided the physical evidence as requested. He had then been under officers' supervision for nearly three hours. (Tpp. 206-08) At this point, Sheriff Bobby Medford entered the interview room and demanded, "What did you do with the rifle that Karen Styles was shot with?" Respondent said, "I think I need a lawyer present." A detective participating in the questioning recorded in his notes, "2:04 p.m., on 12-20-94, wants a lawyer present." (Tp. 338) The Sheriff stated that Respondent did not have to answer any more questions, but added, "Son, I know you bought the rifle and the duct tape at Kmart on the 28th of October. I know that you were in Bent Creek on the day she was killed and that's fine, but you need help." Respondent then broke down crying, repeating that he "didn't mean to kill her." (Tpp. 209-10)

The detective in charge of the investigation then consulted with the District Attorney, stating that Respondent had requested a lawyer, but that he was not "under arrest." The detective returned to the interview room and obtained a second waiver of *Miranda* rights from Respondent. (Tp. 212) Respondent then confessed to the

kidnapping, rape, and killing of Karen Styles. (Tpp. 214-15) There was "not one shred" of physical evidence connecting Respondent with the crime scene. (Tpp. 544-45) Nor was the FBI able to connect the .22 rifle in question with the killing; the crime lab was not even able to identify the origin of the metal fragments in the victim's head. (Tpp. 533-37).

Charged with first degree kidnapping, rape, and murder, Respondent pleaded not guilty. The trial court denied Respondent's pretrial motion to suppress the confession. Respondent was convicted on all counts and sentenced to death for the murder conviction. On direct appeal of that conviction and sentence, the North Carolina Supreme Court ordered a new trial, holding that the denial of Respondent's motion to suppress violated his Fifth and Fourteenth Amendment rights protected by *Edwards v. Arizona*, 451 U.S. 477, 68 L.Ed.2d 378 (1981) and *Miranda v. Arizona*, 384 U.S. 436, 16 L.Ed.2d 694 (1966). *State v. Jackson*, 497 S.E.2d 409 (N.C. 1998).

REASONS WHY A WRIT SHOULD NOT ISSUE

I. THE NORTH CAROLINA SUPREME COURT PROPERLY APPLIED THIS COURT'S PRECEDENTS IN HOLDING THAT RESPONDENT'S INCRIMINATING STATEMENTS WERE ELICITED DURING A CUSTODIAL INTERROGATION.

The State accuses a unanimous panel of the North Carolina Supreme Court of confusing the Fourth and Fifth Amendments in determining that the trial court violated Respondent's constitutional rights by denying his pretrial motion to suppress incriminating statements obtained during a custodial interrogation. The State's

contention is disingenuous. Based on a misleading representation of the relevant case law, the argument creates a false distinction between the standard analysis employed in the decision below and what the State denominates the "indicia of arrest" test. The distinction collapses under scrutiny. Because the North Carolina Supreme Court correctly understood and applied the law established by this Court to govern custodial interrogations, the State's petition for review should be denied.

The pattern of analysis established by this Court and applied in the decision below is straightforward. The first principle is that

> [i]f at any time during an interrogation of a person in custody the person invokes his right to counsel, the interrogation must cease, and it cannot be resumed without an attorney being present unless the defendant initiates a further discussion with the officers.

Jackson, 497 S.E.2d *at 411* (*citing Edwards*, 451 U.S. 477, and *Miranda*, 384 U.S. 436).

The second principle is that "[a] suspect is in custody when, considering the totality of circumstances, a reasonable person in the suspect's position would not feel free to leave." *Jackson,* 497 S.E.2d *at 411* (*see Miranda*, 384 U.S. at 444) (Fifth Amendment analysis begins when an individual is "taken into custody or otherwise *deprived of his freedom of action* in any significant way") (emphasis added); *Thompson v. Keohane*, 516 U.S. 99, 133 L. Ed. 2d 383, 394 (1995) (issue is "would a reasonable person have felt he or she was not *at liberty to terminate the interrogation and leave*) (emphasis added); *Stansbury v. California*, 511 U.S. 318, ___, 128 L.Ed.2d 293, 300 (1994) (*per curiam*) (issue is "how a reasonable person in that position would perceive

his or her *freedom to leave*") (emphasis added); *Berkemer v. McCarty*, 468 U.S. 420, 440 (1984) (relevant question is "how a reasonable person in the position of the individual being questioned would gauge the breadth of his or her "*'freedom of action'*") (emphasis added);*California v. Beheler*, 463 U.S. 1121, 1125 (1983) (*per curiam*) ("the ultimate inquiry is simply whether there is a "formal arrest or *restraint on freedom of movement*" of the degree associated with a formal arrest.") (emphasis added) (*citing Oregon v. Mathiason*, 429 U.S. 492, 495 (1977) (*per curiam*) (assessing whether "the questioning took place in a context where respondent's *freedom to depart* was restricted in any way") (emphasis added)).

The final rule governing analysis of custodial interrogations is that the "test is necessarily an objective one to be applied on a case-by-case basis considering all the facts and circumstances." *Jackson*, 497 S.E.2d at 411 (*see Stansbury*, 511 U.S. at ___, 128 L.Ed.2d at 300). Applying that rule, the panel concluded unanimously that Respondent "was in custody" when he requested that an attorney be present:

> [At] the request of two deputy sheriffs, the defendant accompanied them to the sheriff's office. While at the sheriff's office, the defendant consented to fingerprinting and gave blood and hair samples. He was under constant supervision. The defendant had told the officers he was anxious to return to work, and despite answering all questions from them and telling them he had no knowledge of the crime, he was never told that he was free to leave or that he would be given a ride to his home or place of work if he decided to leave.
>
> After being in the interrogation room for a period of approximately three hours, during which time he was questioned by the officers in regard to the murder, had hair and blood samples taken, and was fingerprinted, a reasonable man at the least would have wondered whether he was free to leave. When the sheriff asked him what he had done with the rifle he had used to kill the victim, this informed the defendant that the sheriff thought he had committed murder. A

> reasonable man in the defendant's position who had been interrogated for approximately three hours and thought the sheriff believed he had committed murder would not have thought he was free to leave. He would have thought the sheriff intended to hold him for prosecution for murder.

Jackson, 497 S.E.2d at 411.

This straightforward application of the governing law demonstrates that the State has labored mightily to create confusion where none exists; the accusation that the North Carolina Supreme Court does not grasp the distinction between Fourth and Fifth Amendment analyses is clearly false. (Pet. Br. at 15)[1] While the State seeks to muddy the waters by inventing competing names for the test ("free to leave" *versus* "indicia of arrest"), the North Carolina Supreme Court has focused consistently on the question articulated by this Court: whether a reasonable person under the circumstances would consider himself to have his freedom of action deprived in any significant way. However denominated, the freedom to "leave," *Thompson,* 516 U.S. at ___, 133 L.Ed.2d at 394; *Stansbury*, 511 U.S. at ___, 128 L.Ed.2d at 300, the freedom "to depart," *Mathiason*, 429 U.S. at 495, or the "freedom of movement," *Beheler*, 463 U.S. at 1125, is essential to a citizen's "freedom of action." Deprivation of this essential freedom is, equally obviously, "significant"; indeed, it is difficult to conceive of anything more "indic[ative] of formal arrest" than such a deprivation. (Pet.

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[1] It is true that *State v. Medlin*, 426 S.E.2d 402 (N.C. 1993) cites several cases which in turn cite several cases involving the Fourth Amendment. For example, following a detailed review and rejection of defendant's Fifth Amendment claim in *State v. Davis*, 290 S.E.2d 574, 579-585 (N.C. 1982), the opinion briefly referenced this Court's Fourth Amendment ruling in *United States v. Mendenhall*, 446 U.S 544 (1980). As the *Davis* opinion makes clear, however, the Fourth Amendment analysis was undertaken only out of an abundance of caution to address an issue "not squarely presented by an assignment of error" but implicit therein. *Davis*, 290 S.E.2d at 585.

Br. at 14; *compare Black's Law Dictionary* (to "arrest" is "to deprive a person of his liberty by legal authority. Taking...custody of another for the purpose of holding or detaining him....")).

The State has mischaracterized a handful of courts as having "ignored or misunderstood" this Court's Fifth Amendment jurisprudence. (Pet. Br. at 21-23) Cursory analysis of the decisions cited reveals that each adheres as faithfully to the straightforward principles articulated by this Court as did the unanimous panel addressing Respondent's claim. The State's mischaracterization rests, like its petition, on its construction of a distinction without a difference. As this Court made clear recently in *Thompson*, 516 U.S. at ___, 133 L.Ed.2d at 394, the "freedom to leave" test and the "indicia of formal arrest" tests are one and the same:

> [For t]he ultimate "in custody" determination for *Miranda* purposes...[t]wo discrete inquiries are essential...: first, what were the circumstances surrounding the interrogation; and second, given those circumstances, *would a reasonable person have felt he or she was not at liberty to terminate the interrogation and leave*. Once the scene is set and the players' lines and actions are reconstructed, the court must apply an objective test to resolve "the ultimate inquiry": *"[was] there a 'formal arrest or restraint on freedom of movement' of the degree associated with a formal arrest."*

(emphasis added).

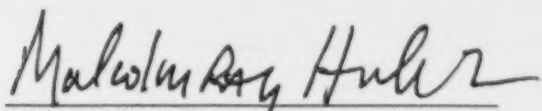
Here, the North Carolina Supreme Court concluded that under all the circumstances of the case a reasonable person in Respondent's position "would not have thought he was free to leave[,]" because "[h]e would have thought the sheriff intended to hold him for prosecution for murder." *Jackson*, 497 S.E.2d at 411. Thus,

the State's attempted distinction between the "free to leave" and "indicia of arrest" tests warrants no further scrutiny and its petition for review should be denied.

CONCLUSION

To review the unanimous decision below on the basis of the State's attempt at wordplay would be a genuine "travesty of justice." (*Compare* Pet. Br. at 24) Respondent respectfully requests that this Court deny the State's Petition.

Respectfully submitted, this the ___ day of August, 1998.



Malcolm Ray Hunter, Jr.
Appellate Defender
Office of the Appellate Defender
123 West Main Street, Suite 600
Durham, North Carolina 27701
(919) 560-3334

COUNSEL FOR RESPONDENT